Supreme Court, U.S.
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No. 99-989

In The

Supreme Court of the United States

CARL E. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. AS TO THE "CESSION OF JURISDICTION" ISSUE THE NPS HAS WAIVED ITS OPPOSITION AND THEREFORE CERTIORARI MUST BE GRANTED.

A. The "Opposition" Of The United States Is Frivolous And May Not Be Considered.

Petitioner Brown demonstrated in his petition that a true, direct, intolerable, and irreconcilable conflict exists between the decision of the Eighth Circuit and decisions of this Court and other Circuit Courts of Appeals regarding the manner in which a state may cede its sovereignty. Petition at 12. The National Park Service (NPS) does not dispute that such a conflict exists but instead argues that this Court should decline to grant certiorari because "[t]his Court denied Brown's previous petition for a writ of certiorari in *Brown I.*" Brief in Opposition at 6; see *United States v. Brown* (Brown I), 552 F.2d 817 (8th Cir. 1977), *cert. denied,* 431 U.S. 949 (1977).

This Court's denial of certiorari in *Brown I* has no precedential value whatsoever. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Teague v. Lane,* 489 U.S. 288, 296 (1989). "[T]his Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Singleton v. C.I.R.,* 439 U.S. 940, 944 (1978).

Therefore, the NPS's argument that this Court should not grant Brown's petition because this Court declined to grant certiorari in a previous case is frivolous, "because

its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255 (1938). A frivolous, or meritless, argument is ignored and is not considered by the courts. *United States v. Bustamante-Gamez*, 488 F.2d 4, 7 n. 2 (9th Cir. 1973) (Court will not "pause to consider" frivolous argument by government); *Northwestern Nat'l. Ins. Co. v. Maggio*, 976 F.2d 320, 321 (7th Cir. 1992).

B. The NPS Has Waived Its Opposition To The Granting Of Certiorari.

Because the NPS's sole argument in opposition to Brown's petition for writ of certiorari on this issue is frivolous and not to be considered by this Court, the NPS has waived its objection to the granting of certiorari. Therefore, this Court should grant this petition.

C. The Fact-Based Argument Of The NPS Is Frivolous And Constitutes A Waiver Of The NPS's Opposition To The Granting Of Certiorari.

The NPS argues that the question presented as to the "cession of jurisdiction" is a "fact-bound, case-specific question, the effects of which are limited to one national park." Brief in Opposition at 6. The NPS is in error.

1. The facts of this case are not limited to one national park.

In *Colorado v. Toll*, 268 U.S. 228, 231 (1925), the NPS sought to regulate state and county highways passing through Rocky Mountain National Park. This Court ruled

that the NPS could not regulate those highways absent cession of jurisdiction from Colorado over those roads.

In *Adams v. United States*, 319 U.S. 312, 315 (1943), this Court held that the United States had no jurisdiction over land that Louisiana had not ceded and the United States had not accepted.

In *New York v. United States*, 505 U.S. 144, 182 (1992), this Court refused to find "cession" of sovereignty in the support of New York officials for federal legislation regarding disposal of radioactive waste in New York.

The facts of this case have occurred in the past, culminating in decisions by this Court as to the manner in which a state may cede its jurisdiction and sovereignty. That they will occur in the future is without question. There are pending in Congress numerous proposals for the creation of national parks and the designation of wilderness areas. Many of these proposals involve issues of state sovereignty. Thus the decision of the Eighth Circuit, that a state cedes its jurisdiction and sovereignty merely by its support of such federal legislation, has important national and constitutional implications. Therefore, this Court should grant this petition.

2. The question of law presented here is of vital constitutional importance.

a. The question presented here is purely a question of law.

This case does not turn upon the facts. Instead, whether cession of jurisdiction over state-owned waters

may be implied judicially from Minnesota's support for creation of the VNP is purely a question of law.

b. The question presented here is one of vital constitutional importance.

Since the Eighth Circuit's *Brown I* decision in 1977, this Court has resisted vigorously attempts by Congress to infringe upon state sovereignty. Most recently in *Kimel v. Florida Board of Regents*, ___ U.S. ___, slip op. at 2 (January 11, 2000) (Sup. Ct. No. 98-791), this Court reaffirmed its central holding in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), that Congress' Article I authority does not include the power to abrogate state sovereign immunity under the Eleventh Amendment. *Id.* at ___ (slip op. at 14).

In *Montana v. United States*, 450 U.S. 544, 552 (1981), this Court affirmed state control over property beneath navigable waters as a sovereign right of the states, holding that that right could not be conveyed by inference.

In *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991), this Court held that Congress may alter the "usual constitutional balance between the States and the Federal Government" only by "unmistakably clear language."

In *New York v. United States*, 505 U.S. at 182, this Court refused to find "cession" of New York's sovereignty in the support of New York officials for a federal statute.

Clearly, the decision of the Eighth Circuit is neither fact bound nor limited to one national park. By raising

such a frivolous argument, the NPS has waived its opposition to the granting of certiorari. Therefore, this Court should grant this petition.

II. THE NPS HAS ENGAGED IN A CYNICAL AND SUPERFICIAL ANALYSIS OF *KLEPPE V. NEW MEXICO* THAT DISTORTS AND MISREPRESENTS THE HOLDING OF THIS COURT.

The NPS has distorted and misrepresented the holding of this Court in *Kleppe v. New Mexico*, 426 U.S. 529 (1976). Whether this distortion and misrepresentation are purposeful or merely the result of carelessness is irrelevant. The result is that the NPS's analysis of *Kleppe* must be rejected.

The NPS asserts erroneously that *Kleppe* "reject[ed]" Brown's argument "that Congress cannot regulate the matters in question unless it first obtains the State's consent through a grant of legislative jurisdiction." Brief in Opposition at 7. *Kleppe* had nothing to do with state cession. "[W]hile Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers [over its own land] under the Property Clause." *Kleppe*, 426 U.S. at 542-543. Thus *Kleppe* did not "reject[ ]" the requirement that a state must consent to the exercise of jurisdiction over "lands within a State." Instead, this Court recognized that Congress could not exercise jurisdiction over state lands without the state's consent.[1]

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[1] "Although the Property Clause *does not authorize* an exercise of a general control over public policy in a State, it does

The NPS asserts erroneously that *Kleppe* "rejected the notion that Congress cannot employ its Property Clause powers unless it first acquires a 'property interest' in the subject of the regulation or the location where the regulated activity takes place." Brief in Opposition at 7. *Kleppe* reached no such conclusion. Rather, this Court held simply that Congress could regulate wild animals living on federal property. *Id.* at 540-541.

The NPS asserts erroneously that *Kleppe* provides the NPS authority to regulate commercial activity on non-federal property. Brief in Opposition at 9. *Kleppe* reached no such holding because *Kleppe* had nothing to do with non-federal property. The only question answered in *Kleppe* was whether Congress could regulate wild horses and burros on federal land: "We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding." *Id.* at 546. Kleppe contains no other holding.[2] In fact, this Court specifically declined to consider whether the Property Clause empowers Congress to regulate non-federal lands.[3]

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permit an exercise of the complete power which Congress has over *particular public property entrusted to it.*" *Id.* at 540 (emphasis added).

[2] "We need not, and do not, decide whether the Property Clause would sustain the [Wild Free-Roaming Horses and Burros] Act in all of its conceivable applications." *Kleppe*, 426 U.S. at 546.

[3] "[W]e do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands . . . . We . . . leave open the question of the permissible reach of the [Wild Free-Roaming Horses and

Clearly *Kleppe* did not reach the holding that the NPS asserts that it reached. As a result, the holding of the Eighth Circuit creates a true, direct, intolerable, and irreconcilable conflict with the holding of this Court in *Kleppe*.

Moreover, contrary to the NPS's argument, *Kleppe* did nothing to undercut Brown's reliance on *Kansas v. Colorado*, 206 U.S. 46 (1907), or *Colorado v. Toll*, 268 U.S. 228 (1925). As to this Court's holding in *Kansas v. Colorado*, the *Kleppe* Court found it to be "no more than [an] articulat[ion of] the obvious: The Property Clause is a grant of power *only over federal property*." *Kleppe*, 426 U.S. at 538-539 (emphasis added). Regarding *Colorado v. Toll*, the *Kleppe* Court described that holding: "Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park . . . ."[4] *Kleppe*, 426 U.S. at 544.

Although the Eighth Circuit relied solely on its erroneous reading of *Kleppe* to support its holding that the Property Clause provides Congress with authority to regulate Minnesota waters,[5] the NPS relies on *Camfield v.*

Burros] Act over private lands under the Property Clause." *Kleppe*, 426 U.S. at 546-547.

[4] This is the very proposition for which Brown cites *Colorado v. Toll*. Just as in *Colorado v. Toll*, because "Congress ha[s] not purported to assume jurisdiction" over Rainy Lake, *Kleppe*, 426 U.S. at 544, the NPS has no authority to regulate it. The Eighth Circuit's holding in *Brown* is in conflict with the holding of this Court in *Colorado v. Toll*.

[5] Although the Eighth Circuit also cited to *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1991), that decision was premised on the same erroneous reading of *Kleppe* as that found in the Eighth Circuit's *Brown* decisions. Similarly, the NPS relies on the Eighth Circuit's decision in *Free Enterprise Canoe Renters Ass'n of*

United States, 167 U.S. 518 (1897), and *United States v. Alford*, 274 U.S. 264 (1927). That reliance is misplaced.

In *Camfield*, this Court allowed removal of a fence, which was built on private property but denied access to federal lands, pursuant to the Property Clause, holding that Congress could protect public lands from such enclosure. *Camfield*, 167 U.S. at 526. Similarly, in *Alford*, this Court upheld Congress' power to prohibit the negligent setting of fires on private land that "imperil[ed]" federal lands. *Alford*, 274 U.S. at 267.[6]

Neither *Camfield* nor *Alford* provides authority for the NPS because Brown's activities on Rainy Lake neither enclosed nor imperiled federal lands.[7] In fact, the NPS

Missouri v. Watt, 711 F.2d 852 (8th Cir. 1983), but that decision was also founded upon *Block* and *Brown I*.

[6] Similarly, *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979) and *United States v. Arbo*, 691 F.2d 862 (9th Cir. 1982), relied upon by the NPS, concerned the authority of federal officials to protect federal land from direct fire or health risk. No such risk was presented by Brown. In *McGrail and Rowley, Inc. v. Babbitt*, 986 F. Supp. 1386 (S.D. Fla. 1997), the plaintiffs were carrying passengers through state-owned waters to the federally-owned island of Boca Grande Key with intent to dock on federal land. Brown did not go onto federal lands nor did he intend to go onto federal lands. Petition at 8.

[7] Moreover, in *Kleppe*, presented with the opportunity to expand its holding in *Camfield*, this Court declined to do so. "While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control, Camfield v. United States, 167 U.S. 518, 17 S. Ct. 864, 42 L.Ed. 260 (1897), we do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands . . . ." *Kleppe*, 426 U.S. at 546.

regulation at issue has nothing to do with protecting public land from inaccessability or peril but with regulating "business operations" within the VNP. 36 C.F.R. § 5.3. Therefore, the Eighth Circuit did not rely on *Camfield* and *Alford*.

This Court should grant this petition to address the conflict between the holding of the Eighth Circuit and the holdings of this Court.

III. THE USE BY THE UNITED STATES OF THE *BROWN* HOLDING IN OTHER CIRCUITS COMPELS THE GRANTING OF CERTIORARI.

This Court should grant certiorari for yet another reason. The United States has cited to the decisions of the Eighth Circuit in *Brown I* and the instant case in numerous federal courts arguing that federal agencies have authority under the Property Clause to regulate state and private lands. For example, before the U.S. Court of Appeals for the Seventh Circuit, the United States argued, "the federal government's authority over federally-owned lands includes the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands." *See* Brief for the Federal Appellees, *Shawnee Trail Conservancy v. United States Dept. of Agriculture*, 7th Circuit, Docket No. 99-3364, at 18 n. 6. The same argument was made before the U.S. Court of Appeals for the Sixth Circuit and was adopted by

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What is also clear from this passage is that the *Kleppe* Court did not view *Camfield* as providing the expansive authority over non-federal lands argued by the NPS.

seven members of an equally divided *en banc* court. *Stupak-Thrall v. United States*, 70 F.3d 881, 885 (6th Cir. 1995), *aff'd en banc*, 89 F.3d 1269 (6th Cir. 1996).

There is absolutely no question but that the holding of the Eighth Circuit is in conflict with the holdings of this Court; nonetheless, the United States is applying the holding of the Eighth Circuit throughout the land.[8] This Court should grant this petition to address this conflict.

CONCLUSION

For all of the above reasons, this Court must grant this Petition.

Respectfully submitted,

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[8] The importance of this case is made clear by the amici brief filed by several states. *See*, Brief of *Amicus Curiae* for the States of Minnesota, Michigan, and Montana at 5-6, 15-18.